Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1976

No. 76-955

DOVER CONVEYOR & EQUIPMENT CO., INC.,
Petitioner,

vs.

THE OHIO SAVINGS & TRUST COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

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TABLE OF CONTENTS

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Constitutional and Statutory Provisions Involved 3
Statement of Facts 4
Reasons for Granting the Writ 7
Conclusion 11
Appendix A Order of Supreme Court of Ohio Overruling Motion to Certify A1
Appendix B Judgment Entry and Opinion of the Court of Appeals A2
Appendix C Ohio Revised Code, Sections 1303.31 through 1303.35 ..... A9

TABLE OF AUTHORITIES

Cases

Fuentes v. Shevin, 407 U.S. 67 (1972) 7
Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) 8
North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) 7
Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969) 8

Constitutional Provisions

United States Constitution, Fourteenth Amendment 2, 3, 6, 7, 10

Statutes

Ohio Revised Code, Section 1303.31 ..... 2, 4, 6, 8, 10
Ohio Revised Code, Section 1303.32 ..... 2, 4, 6, 10
Ohio Revised Code, Section 1303.33 ..... 2, 4, 6, 10
Ohio Revised Code, Section 1303.34 ..... 2, 4, 6, 9
Ohio Revised Code, Section 1303.35 9

Supreme Court of the United States

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DOVER CONVEYOR & EQUIPMENT CO., INC.,
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THE OHIO SAVINGS & TRUST COMPANY,
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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

The petitioner, Dover Conveyor & Equipment Co., Inc., petitions this Court that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Ohio entered in these proceedings on October 14, 1976, dismissing the appeal of petitioner from the judgment of the Court of Appeals for Tuscarawas County, Ohio, entered on June 17, 1976, an appeal presenting substantial constitutional questions.

OPINIONS BELOW

The Supreme Court of Ohio rendered no formal opinion in this proceeding. The Journal Entry of the Supreme Court, which appears in Appendix A, *infra*, p. A1 terminating petitioner's appellate recourse in the courts of the State of Ohio does state, however, that petitioner's

appeal from the Court of Appeals for Tuscarawas County was dismissed solely on the ground that the Supreme Court of Ohio found that that appeal did not raise a substantial constitutional question.

The opinion of the Court of Appeals for Tuscarawas County is presently unreported and appears in Appendix B, *infra*, p. A3. This opinion affirmed the entry of summary judgment by the Court of Common Pleas for Tuscarawas County, Ohio.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on October 14, 1976 (Appendix A, *infra*, p. A2). This petition for writ of certiorari has been filed within ninety (90) days of that date in accordance with 28 U.S.C., Section 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3) and is specifically premised upon questions as to whether certain statutes of the State of Ohio are invalid as being repugnant to the Fourteenth Amendment to the Constitution of the United States of America.

QUESTIONS PRESENTED

This litigation was commenced by The Ohio Savings & Trust Company (hereafter Ohio Savings) to recover from the Dover Conveyor & Equipment Co., Inc. (hereafter Dover Conveyor) the amount of a certain check upon which Dover Conveyor, as drawer of the same, had placed a written stop-payment order. The sole theory upon which Ohio Savings could recover these monies was that it was a holder in due course of the instrument, as such term is defined in Sections 1303.31 through 1303.34 of the Ohio

Revised Code, and was thereby thoroughly and completely immunized from all the personal defenses possessed by Dover Conveyor including full payment and satisfaction of the underlying obligation to the payee-endorser of the same—defenses which, but for the same statutory provisions, would have been available in this litigation and any other litigation concerning this instrument as a full and complete defense to any recovery. The significant question therefore is:

1. Whether the holder in due course doctrine of Ohio Revised Code, Sections 1303.31 through 1303.34, by conditioning the availability of genuine and substantive defenses to defendant-drawers of negotiable instruments upon a determination whether the plaintiff is classified as a mere holder and not a holder in due course, is violative of the Due Process Clause of the Fourteenth Amendment in that it denies drawers of negotiable instruments, such as the petitioner, the full and fair opportunity to be heard before a judgment is entered affecting their property rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States reads, in pertinent part, as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sections 1303.31 through 1303.34 of the Ohio Revised Code, which embody the holder in due course doctrine, are set out in Appendix C, *infra*, pp. A9-A13.

STATEMENT OF FACTS

This litigation arises from the drawing and issuing of a check by petitioner, Dover Conveyor, on December 7, 1971, a check payable to the order of Lloyd Everett. This check was issued as a progress payment for certain construction work being performed by Everett in Oklahoma pursuant to a sub-contract agreement with Dover Conveyor.

This check was placed in the United States mails by Dover Conveyor in an envelope properly addressed to Everett at the Oklahoma construction project. However, soon thereafter, William Hanson, the president of Dover Conveyor, was informed by Everett that the check had still not arrived in the ordinary course of the mails. In order to protect himself, Hanson notified the drawee bank, The Reeves Banking & Trust Company of Dover, Ohio, that he was stopping payment on the check by placing a written stop-payment order on the same. Having done everything possible under the laws of the State of Ohio to preclude payment of the instrument, Hanson issued a second check to Everett. This second check was received and cashed by Everett in full payment and satisfaction of the underlying obligation owed to him by Dover Conveyor.

However, the original check was received by Everett in the meantime. Everett then informed Hanson that he

would personally return the same during the Christmas holidays. Although Everett did spend the holidays in Ohio, the check was never returned to Dover Conveyor. Instead, Everett's wife presented the check for payment to the respondent, Ohio Savings.

The nature of this instrument at the time of its presentation for payment is extremely significant in light of the substantial constitutional questions raised by this petition. This check did not contain the endorsement of "the bearer thereof," and it had never been specially endorsed payable to her order. The instrument had but one endorsement thereon—that being the "apparent" endorsement of Everett, the payee of the instrument.

Despite these highly questionable factors, Ohio Savings never telephoned or otherwise contacted Everett to verify his signature; such a correspondence would undoubtedly have revealed that a written stop-payment order had been placed on the check by Dover Conveyor and that there had otherwise been a full payment and satisfaction of the underlying obligation. Instead, Ohio Savings accepted the check, an instrument in an abnormally large amount for Everett ($6,000.00), on Christmas Eve and initially credited a portion of the proceeds thereof to the then outstanding account of Everett with Ohio Savings—thereby fully settling that account. It, then, gave the bearer of the check the remainder of the proceeds (approximately $5,000.00) in cash. Soon thereafter, Ohio Savings forwarded the check for collection, and, of course, the same was dishonored by The Reeves Banking & Trust Company due to the written stop-payment order.

This litigation was commenced by Ohio Savings to recover the full amount of the check on the theory that it was a holder in due course of the instrument. It rea-

soned that despite the highly questionable circumstances discussed above, it still was statutorily entitled to the label of holder in due course and, therefore, immunized from all the personal defenses available to Dover Conveyor and, in particular, the defense of the full payment and satisfaction of the underlying obligation. On April 7, 1975, the Court of Common Pleas for Tuscarawas County, Ohio, entered summary judgment for Ohio Savings holding, in essence, that Ohio Savings was a holder in due course as a matter of law and was entitled to a judgment as a matter of law due to the statutory preclusion of the availability of Dover Conveyor's defense of full payment and satisfaction of the underlying obligation against this legislatively favored plaintiff. The necessary effect of this ruling was that Dover Conveyor was literally obligated by legislative enactments (Ohio Revised Code, Sections 1303.31 through 1303.34) to pay the same debt twice without the opportunity for a hearing with respect to its every genuine and substantive defense and despite having taken every precautionary step available to preclude just such a circumstance.

This matter was appealed to the Court of Appeals for Tuscarawas County, Ohio, and in the extensive briefs and oral arguments of petitioner, the precise constitutional question presented in this petition was timely submitted, properly raised and argued at considerable length to the Court of Appeals—namely that Ohio Revised Code, Sections 1303.31 through 1303.34 embodying the holder in due course doctrine violate the Due Process Clause of the Fourteenth Amendment. Despite the necessity for a careful scrutiny of these statutory enactments in light of petitioner's constitutional challenge, the Court of Appeals rather summarily dismissed the entire constitutional issue stating

> "The first assignment of error is patently without merit. The holder in due course doctrine comes from the 'law merchant' of England, a part of the law the due process of which was embraced by the Constitution and Bill of Rights at our national inception."

Thereafter, petitioner timely and properly appealed to the Supreme Court of Ohio raising the same constitutional question in its Memorandum in Support of Jurisdiction. The Supreme Court of Ohio, however, also chose not to resolve this constitutional question on its merits and dismissed petitioner's appeal ending all judicial recourse within the court system of the State of Ohio.

REASONS FOR GRANTING THE WRIT

1. The decisions of the Supreme Court of Ohio and the Court of Appeals for Tuscarawas County, Ohio, directly conflict with the due process principles enunciated in several of this Court's recent decisions.

In recent years, this Court has had considerable opportunity to examine the Due Process Clause of the Fourteenth Amendment and to enunciate the precise meaning of the procedural safeguards this clause affords. Some of these decisions have dealt specifically with state legislation in the field of "commercial law."

In both *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), this Court emphasized the central meaning of procedural due process—that parties whose rights are to be affected are entitled to an opportunity to be heard at a meaningful time and in a meaningful manner. Justice

and the fair process of decision-making—in short, the due process of law—mandate that every individual who might be deprived of a significant property interest and/or personal right or liberty via judicial process be provided the opportunity to meet the case against him by presenting each and every genuine and substantive defense which he possesses. Such was not a novel proposition of law, for this Court has long recognized that it is axiomatic that a hearing provide a real test and be such as is aimed at establishing the validity of the underlying claim against the alleged debtor-defendant. *See also, Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337 (1969); *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306 (1950).

Therefore, these commercial law decisions, as well as many other decisions of this Court analyzing the nature of procedural due process, have established beyond a shadow of a doubt that state legislation simply cannot deny a defendant the opportunity to present each and every genuine defense which he may possess in order that the validity of the underlying claim may be resolved on the basis of every available fact. When such state legislation, furthermore, necessarily permits unilateral and summary adjudication which deny such a full hearing, the procedural due process infirmities of the same are only magnified.

The decisions of the lower courts in this case cannot be squared with the procedural due process principles enunciated by this Court in recent years. The holder in due course doctrine of Ohio Revised Code, Sections 1303.31 through 1303.34, which was the basis for these decisions, completely undermines the foundation of procedural due process--the opportunity to present each and every genuine and substantive defense which one may possess in an impartial judicial proceeding before a judg-

ment is entered depriving a defendant of a significant property interest. This doctrine quite precisely delineates those defenses—the only defenses—which are available against one falling into the legislatively established class of a holder in due course. With the exception of the enumerated defenses in Sub-section (B) of Ohio Revised Code, Section 1303.34, those deemed to be holders in due course take negotiable instruments free from all claims to the same and free from all defenses of any party to the instrument. The necessary consequence of this categorization of defenses is, then, that those with genuine and substantive so-called "personal defenses," such as the full payment and satisfaction of the underlying obligation (the precise defense which your petitioner possesses), are precluded from raising the same should the plaintiff be classified a holder in due course. These defenses are only available—may only be judicially recognized—if the plaintiff is a mere holder of the commercial paper. Such is made clear by Ohio Revised Code, Section 1303.35. If one has the constitutional right to defend and protect his property interests and personal liberties in a full, fair and impartial hearing, then defenses may not and cannot be segregated into distinct categories—those which may be asserted and those which cannot be raised. Such a segregation of defenses, in essence, creates two systems of justice—two types of hearings depending upon the character of the plaintiff. This means that one's expectations of justice have no firm foundation; in each and every case, one is at the mercy, as it were, of one's opponent as far as the availability of defenses is concerned.

This Court has repeatedly emphasized that unilateral and summary adjudication which may well result in the deprivation of property interests and/or personal rights or liberties simply is not consistent with procedural due

process. Yet, this too is the ultimate consequence of, and the precise effect of, the holder in due course doctrine. When genuine and substantive defenses are legislatively made unavailable, the plaintiff is the only individual for whom "justice" may be served. Despite the physical presence of the defendant, the hearing which takes place is unilateral and summary in nature. The trial court hears only a partial story, and a judgment is rendered upon the incomplete picture, as presented by the plaintiff, against the defendant. The latter has not been afforded the opportunity for a full and fair hearing; he has never presented his each and every genuine and substantive defense and received that due process of law mandated by the Fourteenth Amendment.

In short, petitioner who possessed a genuine and substantive defense—the full payment and satisfaction of the underlying obligation—was denied the opportunity to raise the same by the holder in due course doctrine of Ohio Revised Code, Sections 1303.31 through 1303.34. Consequently, these statutes and the application of the same by the lower courts in this litigation have denied the petitioner that procedural due process to which it was entitled by the Fourteenth Amendment to the Constitution of the United States.

This Court has never considered the constitutionality of the holder in due course doctrine, in light of the due process mandate of the Fourteenth Amendment. However, in recent years, this Court has deemed it extremely important to review several cases challenging the constitutionality of state statutes concerned with related aspects of commercial law. Such review has resulted in the same being held repugnant to the fundamental meaning of procedural due process. The arguments of petitioner that the holder in due course doctrine is repugnant to the

due process principles enunciated in this Court's recent decisions and to the Due Process Clause itself have continuously fallen on deaf ears in the Courts of Ohio. The repeated application of the holder in due course doctrine has diminished the incentive banks have for maintaining careful check-cashing procedures. Petitioner, therefore, respectfully prays that this Court recognize the significant and substantial constitutional question raised by this petition and assume jurisdiction of a matter of grave public concern.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion and judgment of the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX A

Order of the Supreme Court of Ohio Overruling Motion to Certify

(Filed October 14, 1976)

No. 76-896

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
)
CITY OF COLUMBUS.)

OHIO SAVINGS & TRUST COMPANY,
Appellee,

vs.

DOVER CONVEYOR & EQUIPMENT CO., et al.,
Appellants.

MOTION FOR ORDER DIRECTING THE COURT OF APPEALS FOR TUSCARAWAS COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

APPENDIX B

Judgment Entry of the Court of Appeals

(Filed June 17, 1976)

Case No. 1192

IN THE COURT OF APPEALS FOR
TUSCARAWAS COUNTY
FIFTH APPELLATE DISTRICT

THE OHIO SAVINGS AND TRUST COMPANY,
Plaintiff-Appellee,

vs.

DOVER CONVEYOR AND EQUIPMENT COMPANY, INC., et al.,
Defendants-Appellant

JUDGMENT ENTRY

For the reasons stated in the memorandum on file, both assigned errors are overruled, the judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for the execution of judgment.

/s/ NORMAN J. PUTMAN
/s/ LELAND RUTHERFORD
/s/ DAVID D. DOWD, JR.
Judges

Opinion of the Court of Appeal

(Filed June 17, 1976)

Case No. 1192

IN THE COURT OF APPEALS FOR
TUSCARAWAS COUNTY
FIFTH APPELLATE DISTRICT

THE OHIO SAVINGS AND TRUST COMPANY,
Plaintiff-Appellee,

vs.

DOVER CONVEYOR AND EQUIPMENT COMPANY, INC., *et al.*,
Defendant-Appellant.

PUTMAN, *J.*

This appeal arises from a summary judgment rendered by the Court of Common Pleas of Tuscarawas County, Ohio, in favor of Plaintiff-Appellee, The Ohio Savings & Trust Company, and against Defendant-Appellant, Dover Conveyor and Equipment Co., Inc.

Appellee filed suit on January 27, 1972, against Appellant and Lloyd Everett, based upon a check drawn by Appellant payable to the order of Lloyd Everett and negotiated to Appellee.

Appellant filed its answer and counterclaim.

On April 7, 1975, Appellee filed its motion for Summary Judgment supported by the affidavit of Jerry Gordon and the depositions of Marjorie Hanson and William Hanson. Appellant filed no affidavit or other evidence in opposition to said motion.

The trial court sustained Appellee's motion for summary judgment on October 27, 1975.

Appellant filed the instant appeal from the order of the trial court as to the judgment in favor of Appellee on the complaint. However, there has been no appeal from the judgment dismissing the counterclaim of the Appellant.

Error is assigned as follows:

1. The trial court's determination and judgment was premised upon unconstitutional statutes; and
2. The pleadings, depositions and arguments before the court presented genuine issues of material fact with respect to whether plaintiff-appellee was, in fact, a holder in due course which issues were within the province of and should have been left for the jury.

The first assignment of error is patently without merit. The holder in due course doctrine comes from the "law merchant" of England, a part of the law the due process of which was embraced by the Constitution and Bill of Rights at our national inception. See *Hardy v. Gissendaner*, 508 F.2d 1207 (1975).

The second assignment identifies no fact issue with specificity. See *North v. Pa. Ry. Co.*, 9 Ohio St. 2d 169 Syllabus 3. Moreover, we find no genuine dispute as to any material issue of fact.

A check dated December 7, 1971, issued by Appellant payable to the order of "Lloyd Everett, General Contractor" was drawn upon the Reeves Banking & Trust Company of Dover, Ohio, was acquired by Appellee on December 24, 1971. The check appears to be indorsed by Lloyd

Everett. Appellee credited a portion of the proceeds of the check to the account of Lloyd Everett, the payee named thereon, and delivered the balance of the proceeds to the bearer of the check, his wife.

Said check was later returned by the payor-bank, the Reeves Banking & Trust Company, which refused payment and dishonored the same with the notation that Appellant had stopped payment on said check.

Appellee's motion for summary judgment was supported by the admissions in the pleadings, the admissions in the depositions of Marjorie and William Hanson, and the affidavit of Jerry Gordon.

Appellant failed to file any documents in opposition to the motion, but relied solely on its answer and a memorandum. Civil Rule 56 (E) states:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Civil Rule 56 (C) does not include memoranda and oral arguments as evidentiary items to be considered in deciding whether to grant a summary judgment:

> "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any timely filed in the action, show that there

is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule."

Appellee was entitled to judgment because there was no evidence presented tending to establish that Plaintiff-Appellee was not a holder in due course.

Appellant in its brief, lists the following "red flags" as establishing that there was an issue of fact as to whether Plaintiff-Appellee acted in good faith. Actually, his argument is that summary judgment was not appropriate upon these undisputed facts:

1. Size of check ($6,000.00).
2. Presentment 17 days after execution.
3. Present on December 24 (Christmas Eve).
4. Negotiation of check by payee's wife without her indorsement.
5. Payee having overdue account with Appellee and part of proceeds used to pay this account.
6. Appellee aware of payee's financial condition and that he previously had been unable to deposit funds to cover his checks.

We hold these six facts, even if undisputed, raise no jury issue as to good faith of the Appellee. *Appellee had previously cashed checks drawn by Appellant to the order of Lloyd Everett and had been previously advised by Appellant that it would be issuing such checks to Lloyd Everett.* (Affidavit of Jerry Gordon, and Deposition of William Hanson, page 17). Presentment seventeen days after it was drawn is not unreasonable.

Ohio Revised Code, Section 1303.33 (C) (3) states:

"A reasonable time for a check drawn and payable within the states and territories of the United States and the District of Columbia is presumed to be thirty days."

Presentment on December 24 (Christmas Eve) is not suspicious.

The negotiation of the check by payee's wife without her indorsement is not legally relevant. Lloyd Everett admitted in his answer that he had indorsed the check. Therefore, this check constituted bearer paper. The fact that Lloyd Everett's wife presented the check to the bank without her signature is acceptable under the Uniform Commercial Code. Ohio Revised Code, Section 1303.33 (D) (5) indicates that it was proper for the bank cashing the check to give the money to the wife of the indorser.

R.C. 1303.33 (D) (5) states:

"(D) Knowledge of the following facts does not of itself give the purchaser notice of a defense or claim:

* * * * *

(5) That any person negotiating the instrument is or was a fiduciary."

The fifth point asserted by Appellant that payee's account was overdue, is not supported by the record. However, assuming arguendo there were such evidence, the fact that a portion of the proceeds of the check were used to pay an overdue account of the payee of the check constitutes no impropriety.

Finally, as to the sixth alleged fact, we find no evidence before the trial court that the bank knew the indorser's financial condition or that he had previously been

unable to deposit funds to cover his own checks. Assuming arguendo such evidence existed, the bank cashing a check is primarily concerned with the solvency of the drawer of the check. The payee or indorser's reputation for financial capability is not notice under the Uniform Commercial Code that there is a defense to the check. It has been held that evidence showing that a person cashing a check had no confidence in the financial capability of the payee but relied on the drawer's credit does not vitiate the status of holder in due course. *Springer v. Erdman,* 210 N.Y.S. 224 (N.Y. Supreme Court, 1925). In that case the Court stated at page 224:

> "The sole question in the case is whether plaintiff was a bona fide purchaser for value. The court below has found that he was not. The only evidence to sustain this finding is that he admitted he had no confidence in (payee's) financial responsibility, and cashed the check in reliance on the credit of the maker, and the circumstance that he cashed the check 11 days after its date. It cannot be said that plaintiff was put on notice when a financial irresponsible person presented to him the check of a responsible person to be cashed, nor is any inference of fraud or bad faith permissible from the mere circumstance that 11 days had elapsed."

For the foregoing reasons, both assigned errors are overruled, the judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for the execution of judgment.

/s/ NORMAN J. PUTMAN
/s/ LELAND RUTHERFORD
/s/ DAVID D. DOWD, JR.
Judges

RUTHERFORD, *P.J.* and DOWD, *J.*, concur.

APPENDIX C

Ohio Revised Code

"§1303.31 (UCC 3-302) Holder in due course.

(A) A holder in due course is a holder who takes the instrument:

(1) for value; and

(2) for good faith; and

(3) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

(B) A payee may be a holder in due course.

(C) A holder does not become a holder in due course of an instrument:

(1) by purchase of it at judicial sale or by taking it under legal process; or

(2) by acquiring it in taking over an estate; or

(3) by purchasing it as part of a bulk transaction not in regular course of business of the transferor.

(D) A purchaser of a limited interest can be a holder in due course only to the extent of the interest purchased.

§1303.32 (UCC 3-303) Taking for value.

A holder takes the instrument for value:

(A) to the extent the agreed consideration has been performed or that he acquires a security interest in or a lien on the instrument otherwise than by legal process; or

(B) when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due; or

(C) when he gives a negotiable instrument for it or makes an irrevocable commitment to a third person.

§1303.33 (UCC 3-304) Notice to purchaser.

(A) The purchaser has notice of a claim or defense if:

(1) the instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity, terms or ownership or to create an ambiguity as to the party to pay; or

(2) the purchase has notice that the obligation of any party is voidable in whole or in part, or that all parties have been discharged.

(B) The purchaser has notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty.

(C) The purchaser has notice that an instrument is overdue if he has reason to know;

(1) that any part of the principal amount is overdue or that there is an uncured default in payment of another instrument of the same series; or

(2) that acceleration of the instrument has been made; or

(3) that he is taking a demand instrument after demand has been made or more than a reasonable

length of time after its issue. A reasonable time for a check drawn and payable within the states and territories of the United States and the District of Columbia is presumed to be thirty days.

(D) Knowledge of the following facts does not of itself give the purchaser notice of a defense or claim:

(1) that the instrument is antedated or postdated;

(2) that it was issued or negotiated in return for an executory promise or accompanied by a separate agreement, unless the purchaser has notice that a defense or claim has arisen from the terms thereof;

(3) that any party has signed for accommodation;

(4) that an incomplete instrument has been completed, unless the purchaser has notice of any improper completion;

(5) that any person negotiating the instrument is or was a fiduciary;

(6) that there has been default in payment of interest on the instrument or in payment of any other instrument, except one of the same series.

(E) The filing or recording of a document does not of itself constitute notice within the provisions of sections 1303.01 to 1303.78, inclusive, of the Revised Code, to a person who would otherwise be a holder in due course.

(F) To be effective, notice must be received at such time and in such manner as to give a reasonable opportunity to act on it.

§1303.34 (UCC 3-305) Rights of a holder in due course.

To the extent that a holder is a holder in due course he takes the instrument free from:

(A) all claims to it on the part of any person; and

(B) all defenses of any party to the instrument with whom the holder has not dealt except;

(1) infancy, to the extent that it is a defense to a simple contract; and

(2) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and

(3) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and

(4) discharge in insolvency proceedings; and

(5) any other discharge of which the holder has notice when he takes the instrument."

Section 1303.35 of the Ohio Revised Code, which delineates the rights of one not a holder in due course states as follows:

"Unless he has the rights of a holder in due course any person takes the instrument subject to:

(A) all valid claims to it on the part of any person; and

(B) all defenses of any party which would be available in an action on a simple contract; and

(C) the defenses of want or failure of consideration, non-performance of any condition precedent, nondelivery, or delivery for a special purpose; and

(D) the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party."

Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1976

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THE OHIO SAVINGS & TRUST COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

Statement of the Case 1

Reason for Denying the Writ 3

1. The decisions of the Supreme Court of Ohio and the Fifth District Court of Appeals do not conflict with the due process principles enunciated by decisions of this Court 3

Conclusion 6

Appendix A:

Order of the Supreme Court of Ohio Dismissing Appeal 7

TABLE OF AUTHORITIES

Cases

Ferguson v. Skrupa, 372 U.S. 726 (1973) 4

Fuentes v. Shevin, 407 U.S. 67 (1972) 3

Hardy v. Gissendaner (5th Cir.), 508 F.2d 1207 (1975) 4, 5, 6

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) 4

North Georgia Fishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) 3

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 3

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 4

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 4

Supreme Court of the United States

October Term, 1976

No. 76-955

DOVER CONVEYOR & EQUIPMENT CO., INC.,
Petitioner,

vs.

THE OHIO SAVINGS & TRUST COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

A check dated December 7, 1971, issued by Petitioner payable to the order of "Lloyd Everett, General Contractor" drawn upon the Reeves Banking & Trust Company of Dover, Ohio, was acquired by Respondent on December 24, 1971, in the normal course of its business. The check was endorsed by Lloyd Everett. Respondent credited a portion of the proceeds of the check to the account of Lloyd Everett, the payee named thereon, and delivered the balance of the proceeds to the bearer of the check, his wife.

Said check was later returned by the payor-bank, the Reeves Banking & Trust Company, which refused payment and dishonored the same with the notation that Petitioner had stopped payment on said check.

Despite the reference in Petitioner's Brief (page 5) to the "apparent" endorsement of Everett, no evidence was introduced by Petitioner that Everett did not endorse the

check and Everett, in his Answer, admitted that he endorsed the check.

Furthermore, Petitioner neglects to mention that Respondent had contacted Petitioner prior to December 24, 1971, and had been advised that Petitioner would be issuing checks to Lloyd Everett in the future.

Respondent filed suit on January 27, 1972, in the Common Pleas Court of Tuscarawas County, Ohio, against Petitioner and Lloyd Everett.

Petitioner filed its Answer. Defendant Lloyd Everett filed his Answer and a Cross-Claim against Petitioner. Petitioner Answered the Cross-Claim of Defendant Lloyd Everett and filed its Cross-Claim against Everett seeking to recover its damages arising from negotiation of the check.

On July 6, 1972, Defendant Lloyd Everett and Petitioner approved and filed a Judgment Entry settling and dismissing their respective Cross-Claims.

On April 7, 1975, Respondent filed its Motion for Summary Judgment supported by an affidavit, admissions in the pleadings, and the depositions. Petitioner filed no evidence in opposition to said Motion.

The Trial Court sustained Respondent's Motion for Summary Judgment on October 27, 1975.

Petitioner appealed the Order of the Trial Court to the Fifth District Court of Appeals which unanimously affirmed the judgment of the Tuscarawas County Common Pleas Court.

Petitioner appealed to the Ohio Supreme Court which dismissed the appeal for the reason that no substantial constitutional question was raised (Respondent's Appendix A).

REASON FOR DENYING THE WRIT

1. The decisions of the Supreme Court of Ohio and the Fifth District Court of Appeals do not conflict with the due process principles enunciated by decisions of this Court.

Petitioner contends it was unable to raise the issue of payment of the obligation underlying the check. However, Petitioner did raise that issue as to the payee of the check (Everett), and Petitioner and Everett resolved this claim in the State Court proceedings. Consequently, Petitioner appears to be raising a spurious issue in an attempt to challenge the constitutionality of the Ohio statutes relating to holder in due course.

Petitioner argues that a due process violation exists because Petitioner is prevented by Ohio statute from raising certain defenses against a holder in due course of a check that it could have raised against a mere holder of a check. Petitioner's argument, which is framed as a procedural due process attack, ignores the crucial fact that Petitioner can assert only those defenses that the law establishes as defenses. Petitioner is attempting to raise alleged defenses that the Ohio law has explicitly stated are not defenses to a holder in due course. Since Petitioner could, *and did*, assert his claims against its payee/endorser, the holder in due course statute does not amount to a denial of procedural due process.

Three of the United States Supreme Court cases cited by Petitioner, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *North Georgia Fishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), involve situations where property was taken from one party before a hearing was held to establish whether that party

had any legally available defense to the underlying claim. In *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), the issue was adequacy of notice under a New York statute. In the instant case, no property was taken from Petitioner before the filing of the Complaint nor before an opportunity to be heard.

Since it is meaningless to talk about being denied the opportunity to present a "defense" that is not a legally available defense, Petitioner's argument is apparently an attack upon the constitutionality of the Ohio legislature's affording a holder in due course immunity from certain defenses, rather than an attack upon the procedural aspects. To support such a *substantive* due process argument Petitioner must prove that the legislature acted arbitrarily or unreasonably in granting such protection to a holder in due course. *Ferguson v. Skrupa*, 372 U.S. 726 (1973); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Considering that the holder in due course provision certainly encourages the negotiability of commercial paper, the Ohio legislature did not act arbitrarily or unreasonably but was within the limits of its constitutional authority.

The United States Fifth Circuit Court of Appeals, dealing with a note and mortgage rather than a check, rejected the same due process constitutional attack in *Hardy v. Gissendaner* (5th Cir.), 508 F.2d 1207, 1209 (1975):

> "Underlying plaintiffs' claim, however, is the contention that the Alabama Holder-in-due course law deprives them of a meaningful hearing by divesting them of their right to interpose legitimate defenses and therefore is unconstitutional. We do not agree. Plaintiffs' theory is based on the contention that the pertinent Alabama law prevents them from asserting the defenses of inferior and incomplete performance of consideration given for the underlying debt.

* * * * *

> While due process requires that there be an opportunity to present every available defense, the fact that plaintiffs are barred from interposing certain defenses against Gissendaner [holder in due course], does not amount to a denial of due process where, as here, they are not foreclosed from pursuing their claims for damages or any other relief to which they are entitled against the individual with whom they contracted. Nothing in Alabama law prevents them from doing so. Any deprivation suffered by plaintiffs is the result of the dereliction of the person with whom they had the misfortune of dealing, not the inadequacy or the invalidity of the law." (citations omitted)

The rationale of *Hardy* is particularly applicable to the present case, since Petitioner, in fact, asserted its claims against the payee/endorser (Everett) in this proceeding and apparently settled same to its satisfaction.

The Fifth Circuit Court of Appeals also discussed the policy rationale underlying the concept of holder in due course:

> "The holder-in-due course concept has long been recognized and used as a vehicle for promoting easy, fast, and inexpensive negotiability of commercial paper. Article 3 of the Uniform Commercial Code dealing with commercial paper and which outlines the rights of a holder in due course, identical to those of Alabama, 'is a continuum of commercial concepts. It is a development that can be traced direct to the genius of Lord Holt and that of Lord Mansfield when they incorporated the Law Merchant into the common law.' If the

law is in need of further change because of certain inequities suffered by consumers through credit transactions, it must be accomplished by the state legislature." *Hardy v. Gissendaner*, 508 F.2d 1207, at 1209-10 (5th Cir. 1975) (citations omitted).

CONCLUSION

The Ohio Courts correctly determined that no substantial constitutional question exists in the instant case. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Order of the Supreme Court of Ohio Overruling Motion to Certify

(Filed October 14, 1976)

No. 76-896

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO)
)
CITY OF COLUMBUS.)

OHIO SAVINGS & TRUST COMPANY,
Appellee,
vs.
DOVER CONVEYOR & EQUIPMENT CO., *et al.*,
Appellants.

APPEAL FROM THE COURT OF APPEALS
FOR TUSCARAWAS COUNTY

This cause, here on appeal as of right from the Court of Appeals for Tuscarawas County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.